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Petrominwork Consulting Sdn Bhd v Petroworld Services Ltd

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HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24NCC-623–11 OF 2019
WONG CHEE LIN J
18 DECEMBER 2019

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Civil Procedure — Injunction — Fortuna injunction — Injunction to restrain defendant from presenting winding up petition — Consent judgment — Whether there was a debt due to the defendant pursuant to the consent judgment — Whether the plaintiff will suffer irreparable damage should winding up petition be allowed to be presented

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This was an application by the plaintiff for a Fortuna injunction to restrain the defendant from presenting a winding up petition against the plaintiff. The plaintiff and defendant had recorded a consent judgment which provided, inter alia, as follow: 'solicitors for the parties are to open a joint current stakeholder account with a local bank within 30 working days from the date of this judgment of which the solicitors shall be joint signatories'. The plaintiff was supposed to deposit sums of monies being 'the payment sum' into the stakeholder account within 14 days from the date of the variation order. The parties had agreed upon the payment sum being deposited into the stakeholder account, solicitors were instructed to make payments to: (a) LHDN; (b) the plaintiff; and (c) the defendant. However, the plaintiff had not comply with the said order and did not deposit the stipulated sums into the stakeholder account. The defendant had served a s 466 notice pursuant to the Companies Act 2016 to the plaintiff demanding the payment sum, subsequently, one Green Palm Offshore Construction Sdn Bhd ('GPOCSB') commenced a suit against both the plaintiff and defendant where it claimed that the plaintiff and the defendant had worked hand in glove to orchestrate a position to cause/effect the winding up of the plaintiff. GPOCSB was applying for the declaration that the amended consent order was null and void and should be set aside. The issues to be determined were: (i) whether there was a debt due to the defendant; and (ii) whether the plaintiff would suffer irreparable damage if a winding up petition was presented by the defendant

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Held, allowing the application:

(1) The plaintiff was not ordered to pay any money to the defendant accordingly there was no debt due to the defendant. The consent judgment was enforceable by way of contempt proceedings in the event

of a default but there was no debt due from the plaintiff to the defendant. Accordingly, any winding up petition had no chance of success (see para 10).

(2) A winding up petition would cause irreparable damage to the plaintiff. The proper recourse available to the defendant was to proceed by way of contempt proceedings because the plaintiff had failed to deposit the stipulated sums into the stakeholder account. The defendant should not institute winding up proceedings against the plaintiff because there was no debt due from the plaintiff to the defendant pursuant to the consent judgment (see paras 14–15).

[Bahasa Malaysia summary

Ini merupakan permohonan plaintif untuk satu injunksi Fortuna untuk menghalang defendan dari mengemukakan petisyen penggulungan terhadap plaintif. Plaintif dan defendan telah merekodkan satu penghakiman persetujuan yang memperuntukkan antara yang lain perkara berikut: 'peguam pihak-pihak akan membuka satu akaun semasa pemegang amanah harta bersama dengan satu bank tempatan dalam tempoh 30 hari berkerja dari tarikh penghakiman ini yang peguamnya akan menjadi penandatangan bersama'. Plaintif sepatutnya mendepositkan sejumlah wang yang merupakan 'jumlah pembayaran' ke dalam akaun pemegang amanah harta tersebut dalam tempoh 14 hari daripada perintah pengubahan. Pihak-pihak bersetuju dengan jumlah yang akan didepositkan ke dalam akaun pemegang amanah harta, peguam diarahkan untuk membuat pembayaran kepada: (a) LHDN; (b) plaintif; dan (c) defendan. Namun plaintif tidak mematuhi perintah tersebut dan tidak mendepositkan wang yang ditetapkan ke dalam akaun pemegang amanah harta tersebut. Defendan telah memberikan notis dibawah s 466 selaras dengan Akta Syarikat 2016 kepada plaintif menuntut jumlah pembayaran tersebut, dan kemudiannya Green Palm Offshore Construction Sdn Bhd ('GPOCSB') telah memulakan guaman terhadap plaintif dan defendan yang mana ia menuntut bahawa plaintif dah defendan telah berkerjasama untuk mewujudkan keadaan yang akan menyebabkan plaintif digulung. GPOCSB memohon untuk satu pengisytiharan bahawa perintah persetujuan terpinda adalah tidak sah dan terbatal dan harus di ketepikan. Isu untuk diputuskan adalah sama ada: (i) wujud hutang kepada defendan; dan (ii) sama ada plaintif akan mengalami kerugian yang tidak boleh dipulihkan sekiranya satu petisyen penggulungan dikemukakan oleh defendan.

Diputuskan, membenarkan permohonan:

(1) Plaintif tidak diperintahkan untuk membayar apa-apa wang kepada defendan dan oleh itu tiada jumlah terhutang kepada defendan. Penghakiman persetujuan boleh dikuatkuasakan melalui cara prosiding penghinaan dalam keadaan ketidakpatuhan akan tetapi tiada jumlah terhutang dari plaintif kepada defendan. Oleh yang demikian, apa-apa

petisyen pengulungan tiada peluang untuk berjaya (lihat perenggan 10).

(2) Satu petisyen pengulungan akan menyebabkan kerugian yang tidak boleh dipulihkan kepada plaintif. Jalan penyelesaian yang wujud kepada defendan adalah untuk mengambil prosiding penghinaan kerana plaintif gagal untuk mendepositkan jumlah yang ditetapkan kedalam akaun pemegang amanah harta tersebut. Defendan tidak sepatutnya memulakan prosiding pengulungan terhadap plaintif kerana tiada jumlah yang terhutang dari plaintif kepada defendan selaras dengan penghakiman persetujuan (lihat perenggan 14–15).]

Cases referred to

Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd [2007] 3 MLJ 316, CA (refd)

Multimedia Development Corp Sdn Bhd v Pembinaan Purcon Sdn Bhd [2006] 2 MLJ 653, HC (refd)

Legislation referred to

Companies Act 2016 s 466

Chinnapalani Devi a/p Arumugam (Rizwana bt Jamal Abdul Nazar with her) (Nor Zabetha Chinna & Co) for the appellant.

Cheong Su Yin (KC Lim with her) (Cheong Su Yin & Co) for the respondent.

Wong Chee Lin J:

[1] This is an application by the plaintiff for a Fortuna injunction to restrain the defendant from presenting a winding up petition against the plaintiff. I have allowed the application. These are the full reasons for my decision.

BACKGROUND FACTS

[2] The plaintiff and the defendant recorded an amended consent judgment dated 5 July 2019 which provided, inter alia, as follows:

> Solicitors for the parties are to open a joint current stakeholder account with a local bank within 30 working days from the date of this Judgment of which the solicitors shall be joint signatories

[3] The plaintiff will deposit the following amounts into the stakeholder account:

(a) the amount of USD656,853 owing to the defendant;

(b) the amount of RM529,767.34 being the withholding tax payable to Lembaga Hasil Dalam Negeri ('LHDN'); and

(c) the amount of USD2,954.72 payable to LHDN as withholding tax ('the payment sum')

[4] The plaintiff shall deposit into the stakeholder account the payment sum within 14 days from the date of this variation order.

[5] Upon the payment sum being deposited into the stakeholder account, parties agree as follows:

(a) solicitors are hereby instructed and authorised by the parties to release and/or make payment from the stakeholder account in the sum of RM529,767.34 being withholding tax to LHDN on account of Ice Pte Ltd within 30 days from the date of this variation order;

(b) solicitors are hereby instructed and authorised by the parties to release and/or make payment from the stakeholder account in the sum of RM1,456,581.93 being withholding tax to LHDN on account of Ice Pte Ltd within 30 days from the date of the variation order;

(c) solicitors are hereby instructed and authorised by the parties to release and/or make payment from the stakeholder account in the sum of USD32,842.65 being withholding tax to LHDN on account of the defendant within 30 days from the date of this variation order;

(d) solicitors are hereby instructed and authorised by the parties to release and/or make payment from the stakeholder account in the sum of USD2,954.72 being withholding tax to LHDN on account of the defendant within 30 days from the date of this variation order;

(e) solicitors are hereby instructed and authorised by the parties to make payment in the amount of RM145,658.19 being the penalty of 10% for late payment in withholding tax due to LHDN directly to the plaintiff;

(f) upon completion of the above, the solicitors are hereby instructed an authorised by the parties to release and/or make payment from the stakeholder account in the sum of RM216,000 directly to the plaintiff; and

(g) solicitors are hereby instructed and authorised to finally release and/or make payment of all the residual sum remaining in the stakeholder account shall be released to the defendant on or before 14 April 2018. Thereafter, the stakeholder account shall be closed within 60 days from the date of this variation order.

[6] The trouble is that the plaintiff did not comply with the above said order and did not deposit the stipulated sums into the stakeholder account.

[7] On or about 24 Oktober 2019, the defendant served a s 466 notice

pursuant to the Companies Act 2016 to the plaintiff demanding the sums of RM529,767.34 and USD659,807.72.

[8] Subsequently, one Green Palm Offshore Construction Sdn Bhd ('GPOCSB') commenced a suit against both the plaintiff and the defendant on 21 November 2019 vide Kuala Lumpur High Court Suit No WA-22NCVC-872–11 of 2019 wherein it claimed that the plaintiff and the defendant had 'worked hand in glove to orchestrate a position to cause/effect the winding up of' the plaintiff.

[9] GPOCSB is applying for a declaration that the amended consent order is null and void and should be set aside.

FINDINGS OF THE COURT

[10] The first thing to note in this case is that pursuant to the consent judgment, the plaintiff was supposed to pay certain sums of money into the stakeholder account. The plaintiff was not ordered to pay any money to the defendant as such. Accordingly, the issue is whether there is a debt due to the defendant in the first place. I am of the view that there is no debt due to the defendant. The consent judgment is enforceable by way of contempt proceedings in the event of a default on the part of the plaintiff but there is no debt due from the plaintiff to the defendant. Accordingly, any winding up petition has no chance of success.

[11] The plaintiff further contends that it will suffer irreparable damage if a winding up petition is presented by the defendant based on the s 466 notice because it has at least two ongoing projects and, in the event the winding up petition is not restrained, the employment of the plaintiff's employees will be affected and the plaintiff's business and financial operation will be adversely affected and there will be a loss of the plaintiff's commercial reputation which will be difficult to regain in the construction industry.

[12] In *Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd* [2007] 3 MLJ 316, the Court of Appeal said this:

> [5] ... McGarvie J discussed the basis on which a court acts to restrain the presentation of a winding up petition and the two branches of the principle that guide courts in the grant of an injunction. In respect of the basis, his Honour said this:
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> When a court restrains the presentation of a winding up petition to that court it exercises part of its inherent jurisdiction to prevent abuse of its process; *Mann v Goldstein* [1968] 1 WLR 1091 at pp 1093–4; [1968] 2 All ER 769. Usually a court acts against abuse of its process after proceedings have been commenced. Thus, existing proceedings may be stayed or dismissed, or documents delivered as a step in

the proceedings may be struck out. This is done to relieve a party to the proceedings from an oppressive and damaging situation in which he has been placed through abuse of court process. The law has long recognized that with proceedings to wind up a company, intervention after the commencement of proceedings would often be too late to relieve the company of oppression and damage. The courts have recognized that irreparable damage may be done to a company merely through public knowledge of the presentation of a petition. Usually the damage flows from the loss of commercial reputation which results. The courts have also been conscious of the pressure which may be put on a company, by a person with a disputed claim against it, threatening to present a winding up petition unless, the company meets his claim. While that threat exists, the company, in order to avoid the damage involved in the presentation of a petition, is pressed to meet the claim although it may have substantial and genuine grounds for regarding itself as not required to do so.

[13] In *Multimedia Development Corp Sdn Bhd v Pembinaan Purcon Sdn Bhd* [2006] 2 MLJ 653, the court said:

[6] ... The cause of action in the present case was tortuous in nature and based on the abuse of process. It must be borne in mind that at the time of the service of the s 218 notice and the inception of this suit by MDC the stay order had yet to be granted by the Shah Alam High Court. The threat of the impending winding up petition pursuant to the s 218 notice was and is still a real threat. MDC was entitled to seek relief by filing the originating summons in encl one (1) because the cause of action had accrued at that point of time. I must reiterate that the s 218 notice constitutes a sufficient threat that MDC's right or interest may be challenged and put in jeopardy after the expiry of the twenty-one days period. At this juncture, a passage appearing in the book entitled, *Ford's Principles of Corporation Law* (6th Ed) written by HAJ Ford and RP Austin deserved reproduction. There at p 818, the learned authors wrote in a language that deserved compliment:

An application for winding up even if subsequently dismissed as being ill-founded, can damage a solvent company's reputation. For that reason a company may be liable to persuade the court at an early stage, before the filing of an application or before the advertising of an application, to issue, in exercise of its inherent jurisdiction to restrain filing or advertisement or both as an abuse of the court's process.

[14] I accept that the presentation of the winding up petition against the plaintiff will cause irreparable damage to the plaintiff.

[15] As I have stated earlier, the proper recourse available to the defendant is to proceed by way of contempt proceedings because the plaintiff has failed to deposit the stipulated sums into the stakeholder account. I am given to understand that the defendant is proceeding with contempt proceedings against the plaintiff. The defendant should not institute winding up proceedings against the plaintiff because there is no debt due from the plaintiff to the defendant pursuant to the consent judgment. In the premises I will allow

A the application of the plaintiff and restrain the presentation of a winding up petition against the plaintiff by the defendant.

Application allowed.

B Reported by Izzat Fauzan

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